Supreme Court, U.S.
FILED
APR 27 2015
OFFICE OF THE CLERK

No. 14-1146

IN THE

Supreme Court of the United States

TYSON FOODS, INC.,

Petitioner,

v.

PEG BOUAPHAKEO, *et al.*, individually and on behalf of all other similarly situated individuals,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

ROBERT L. WIGGINS, JR.
WIGGINS, CHILDS, QUINN & PANTAZIS, LLC
301 19th Street North
Birmingham, AL 35203
(205) 314-0540

SCOTT MICHELMAN
Counsel of Record
SCOTT L. NELSON
PUBLIC CITIZEN LITIGATION GROUP
1600 20th Street NW
Washington, DC 20009
(202) 588-1000
smichelman@citizen.org

Counsel for Respondents

April 2015

QUESTIONS PRESENTED

1. Whether, in this class and collective action for wage/hour violations arising out of an employer's underpayment for employee time spent donning and doffing protective equipment and walking to work sites, the use of individual timesheet evidence and representative proof concerning donning, doffing and walking times was permissible and sufficient to sustain the jury's verdict of liability.

2. Whether a class may be certified when it contains members who may not have been injured.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iii

INTRODUCTION 1

STATEMENT OF THE CASE 2

REASONS FOR DENYING THE WRIT 6

I. The Use Of Representative Proof Here Does Not Warrant Review 6

A. Tyson has waived its objection to the use of representative proof 6

B. Tyson's claimed circuit split on the use of representative proof does not exist 7

C. The Court does not grant review to second-guess facts found in the lower courts, particularly where, as here, ample evidence supported the verdict 14

II. The Question Whether A Class Must Show That All Its Members Sustained Injury Does Not Warrant Review 15

A. The question was not decided below 15

B. The claimed circuit split is illusory 16

CONCLUSION 20

TABLE OF AUTHORITIES

CASES

Anderson v. Mt. Clemens Pottery Co.,
328 U.S. 680 (1946) 5, 7, 8, 9

Bates v. United Parcel Service, Inc.,
511 F.3d 974 (9th Cir. 2007) 17

Bowsher v. Synar,
478 U.S. 714 (1986) 17

Broussard v. Meineke Discount Muffler Shops, Inc.,
155 F.3d 331 (4th Cir. 1998) 11, 12

Cimino v. Raymark Industries, Inc.,
151 F.3d 297 (5th Cir. 1998) 11, 13

City of Springfield v. Kibbe,
480 U.S. 257 (1987) 7

Comcast Corp. v. Behrend,
133 S. Ct. 1426 (2013) 15, 18

In re Deepwater Horizon,
739 F.3d 790 (5th Cir.),
cert. denied sub nom. BP Exploration & Production Inc. v. Lake Eugenie Land & Development, Inc.,135 S. Ct. 754 (2014) 18

Delta Air Lines, Inc. v. August,
450 U.S. 346 (1981) 16

Denney v. Deutsche Bank AG,
443 F.3d 253 (2d Cir. 2006) 17

Espenscheid v. DirectSat USA, LLC,
705 F.3d 770 (7th Cir. 2013) 11, 12

Exxon Co., U.S.A. v. Sofec, Inc.,
517 U.S. 830 (1996) 14

In re Fibreboard Corp.,
893 F.2d 706 (5th Cir. 1990) 11, 13

Fleming v. Pickard,
581 F.3d 922 (9th Cir. 2009) 18

Graver Tank & Manufacturing Co. v. Linde Air Products Co.,
336 U.S. 271 (1949) 14

Horne v. Flores,
557 U.S. 433 (2009) 17

Jimenez v. Allstate Insurance Co.,
765 F.3d 1161 (9th Cir. 2014) 13

Kohen v. Pacific Investment Management Co.,
571 F.3d 672 (7th Cir. 2009) 16, 17

Mazza v. America Honda Motor Co.,
666 F.3d 581 (9th Cir. 2012) 17

McCray v. New York,
461 U.S. 961 (1983) 19

McLaughlin v. American Tobacco Co.,
522 F.3d 215 (2d Cir. 2008) 11, 12

Mt. Clemens Pottery Co. v. Anderson,
149 F.2d 461 (6th Cir. 1945) 8

In re Nexium Antitrust Litigation,
777 F.3d 9 (1st Cir. 2015) 16, 17

Pennsylvania Department of Corrections v. Yeskey,
524 U.S. 206 (1998) 16

In re Rail Freight Fuel Surcharge Antitrust Litigation,
725 F.3d 244 (D.C. Cir. 2013) 18

Rumsfeld v. Forum for Academic & Institute Rights, Inc.,
547 U.S. 47 (2006) 17

Stearns v. Ticketmaster Corp.,
655 F.3d 1013 (9th Cir. 2011) 18

United States v. Johnston,
268 U.S. 220 (1925) 14

In re Urethane Antitrust Litigation,
768 F.3d 1245 (10th Cir. 2014) 11

Village of Arlington Heights v. Metropolitan Housing Development Corp.,
429 U.S. 252 (1977) 17

Wal-Mart Stores, Inc. v. Dukes,
131 S. Ct. 2541 (2011) 4, 8, 10

Zivotofsky v. Clinton,
132 S. Ct. 1421 (2012) 16

MISCELLANEOUS

Shapiro, Geller, et al., *Supreme Court Practice* (10th ed. 2013) 19

INTRODUCTION

Workers at a Tyson Foods meat-processing plant sued Tyson for undercompensating them for time spent walking to their worksites and donning and doffing protective equipment necessary to perform their dangerous jobs. Their lawsuit was certified as a class and collective action. The case was tried using a combination of individual timesheets and, because Tyson kept no records of actual donning/doffing time, representative proof. A jury found in the favor of the plaintiff class, and both the district court and the court of appeals rejected sufficiency-of-the-evidence challenges to the verdict.

Neither of the issues Tyson raises warrants review. First, Tyson objects to the use of representative proof under this Court's *Mt. Clemens* rule, although that rule has been successfully implemented by the lower courts for nearly seventy years. As a threshold matter, Tyson waived that issue by proposing a jury instruction, adopted by the trial court, telling the jury to consider the evidence to which Tyson now objects. In any event, Tyson is incorrect that either *Mt. Clemens* or the use of representative proof generally has created a circuit split. *Mt. Clemens* created a special rule for wage/hour cases. The cases on which Tyson relies either do not involve wage/hour claims or involve quite different factual circumstances than those here. When the claimed conflict over representative proof is set aside, what remains of Tyson's first question is one manifestly unsuited for review: the sufficiency of the evidence in this particular case.

Second, Tyson asks whether a class may be certified if some members may not have suffered

injury. This question is not properly presented here because the court of appeals did not address it: instead, it found that Tyson had forfeited the argument by inviting the error it now challenges. Whether the court was right on that point is not itself a question that merits review, and Tyson does not contend otherwise. Nor, indeed, do Tyson's questions presented encompass a challenge to the court's holding on forfeiture. Even if these points could be overlooked, the issue would be better addressed in a case in which the lower court decided it. In any event, Tyson does not show a square conflict among the circuits on the question whether a class may be certified if it contains potentially uninjured members. Several circuits have, consistent with this Court's standing jurisprudence, answered that question in the affirmative after careful analysis. Although Tyson points to a few circuit decisions that contain conflicting statements, these statements were unaccompanied by analysis and were not outcome-determinative.

The court of appeals properly held, under the deferential standard applicable to sufficiency-of-evidence review, that sufficient evidence supported the jury's verdict. The petition should be denied.

STATEMENT OF THE CASE

Respondents are a class of employees at the Storm Lake, Iowa, meat-processing facility of petitioner Tyson Foods. Pet. App. 1a. Tyson compensates its employees for what it calls "gang time" — that is, time when the employees are at their work stations and the production line is moving. *Id.* at 2a. Before 2007, for employees in a department where knives are used, Tyson added four

minutes of additional time ("K-code time") for donning and doffing protective equipment. *Id.* From February 2007 to June 2010, Tyson also added several minutes for pre- and post-shift walking time. *Id.* Tyson does not record the time employees spend donning and doffing personal protective equipment and walking to their work stations. *Id.*

In 2007, the employees brought federal Fair Labor Standards Act (FLSA) and Iowa Wage Payment Collection Law (IWPCL) claims against Tyson seeking unpaid overtime. *Id.* at 2a, 5a. The employees claimed that that Tyson's K-code time was insufficient to cover compensable pre- and post-production activities including donning, doffing, and walking. *Id.* The district court certified the FLSA claims as a collective action and the IWPCL claims as a class action under Federal Rule of Civil Procedure 23. *Id.* at 5a. The FLSA claim and IWPCL claim were substantively the same and subject to the same "terms of proof." *Id.* at 5a n.2.[1]

At a nine-day trial, plaintiffs introduced average donning, doffing and walking times calculated from 744 employee observations and applied this evidence to class members individually using individual timesheets and pay data from Tyson. *Id.* at 5a, 13a. The plaintiffs' expert testified that the sample was "large for this type of study" and "representative." *Id.* at 13a. Tyson's Director of Human Resources

---

[1] For simplicity, and following Tyson's convention, respondents will refer to themselves hereafter as a "class" rather than repeating that they are both a class and collective action. There was no separate verdict on the claims of the collective-action opt-in plaintiffs.

conceded that K-code time did not include the donning and doffing of much protective equipment that was non-unique. *Id.*

The jury was instructed to return an aggregate verdict on damages, but Tyson did not object to an aggregate verdict, and the jury was also instructed that individuals who had already received full compensation could receive no award. *See id.* at 130a-31a (Benton, J., respecting the denial of rehearing en banc); *see also id.* at 10a (majority opinion) ("[T]he jury was instructed, 'Any employee who has already received full compensation for all activities you may find to be compensable is not entitled to recover any damages.'"). Backpay was calculated separately for each class member based on his or her unique days and hours worked over 40 per week and his or her hourly rate. *See* Trial Tr., *Bouaphakeo v. Tyson Foods*, No 5:07-cv-04009 (N.D. Iowa) ("Tr."), at 1266-70 (testimony of plaintiffs' expert Dr. Liesl Fox). Individuals whose damages amount was less than $50 were excluded. Jt. App'x, *Bouaphakeo v. Tyson Foods*, No. 12-3753 (8th Cir.) ("8th Cir. JA"), at 869-71 (Pls.' Exs. 345, 346 & 348); Tr. at 1278, 1285. The jury had before it exhibits containing individualized damages breakdowns. 8th Cir. JA 904-72, 1004-83 (Def.'s Exs. 2272 & 2274).

The jury returned a verdict for the class of just under $2.9 million; with liquidated damages, the final judgment was just under $5.8 million. Pet. App. at 5a-6a.

The court of appeals affirmed. First, the court rejected Tyson's argument that the variations among class members in donning and doffing time defeated class certification under *Wal-Mart Stores, Inc. v.*

Dukes, 131 S. Ct. 2541 (2011). The court explained that, unlike in *Dukes*, Tyson had a single policy that applied to all class members. Pet. App. 8a. The use of representative proof was permitted by *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946), the court explained, because Tyson does not record its employees' donning, doffing, and walking time, and individual variances in numbers of minutes spent on these activities did not prevent a common adjudication. Pet. App. 8a. Next, regarding Tyson's argument that a class cannot contain any uninjured members, the court found that a jury instruction requested by Tyson and accepted by the court had invited the claimed error. *Id.* at 8a-10a.

As for Tyson's claim that the district court had held an impermissible "trial by formula," the court of appeals again found that *Mt. Clemens* justified the use of representative proof and further noted that the class used individual employee time records, *id.* at 10a, to "apply this [representative] analysis to each class member individually," *id.* at 11a. Finally, the court of appeals rejected a sufficiency-of-the-evidence challenge to the verdict on damages because the plaintiffs' use of a "sample of 744 observations of employee donning, doffing, and walking" was supported by expert testimony that "the sample was large for this type of study, representative, and approximately random" and that "the study used 'accepted procedure in industrial engineering.'" *Id.* at 13a. Moreover, Tyson's own Director of Human Resources testified that "K-code time did not include the donning and doffing of much non-unique" protective equipment, and Tyson's own data "showed the amount of K-code time each individual received." *Id.*

Judge Beam dissented, arguing that individual differences in donning and doffing times made class treatment inappropriate, *id.* at 21a-23a, and that the class and collective claims should have been treated separately, *id.* at 23a-24a.

The court denied Tyson's petition for rehearing and rehearing en banc. *Id.* at 114a. Judge Beam again dissented, arguing that the panel opinion misapplied *Mt. Clemens*, *id.* at 119a-22a, and that the verdict would compensate individuals with no or de minimis damages, *id.* at 122a-25a. Judge Benton, the author of the majority opinion, wrote a brief opinion respecting the denial of rehearing en banc. *Id.* at 127a-131a. Responding to Judge Beam on the question of uninjured class members, Judge Benton observed that "[t]he court, without objection, instructed the jury *only* as to aggregate damages." *Id.* at 130a (citing the verdict form; emphasis added). Moreover, as Judge Benton explained, under the jury instructions, "employees without damages are not entitled to allocation of the award." *Id.* at 131a (quoting Jury Instruction No. 8: "Any employee who has already received full compensation for all activities you may find to be compensable is not entitled to recover any damages.").

REASONS FOR DENYING THE WRIT

I. The Use Of Representative Proof Here Does Not Warrant Review.

A. Tyson waived its objection to the use of representative proof.

In the district court, Tyson proposed jury instructions that incorporated the very methodology it now claims was erroneous. Specifically, Tyson proposed to instruct the jury that, in determining

damages, it should evaluate whether the plaintiffs showed the amount of uncompensated work "as a matter of just and reasonable inference" and that, if Tyson failed to negate the reasonableness of the inference to be drawn from plaintiffs' evidence, the jury could "then award damages to the employees even though those damages will only be approximate." Doc. 151, *Bouaphakeo v. Tyson Foods*, No 5:07-cv-04009 (N.D. Iowa), at 41 (Defs.' proposed jury instruction No. 23). The actual jury instruction given incorporated all of Tyson's proposed language. *See* Doc. 277, *Bouaphakeo*, at 16 (Instruction No. 8).

This Court has found waiver where a party proposed a jury instruction incorporating a standard to which it objected on subsequent review. *City of Springfield v. Kibbe*, 480 U.S. 257, 258-59 (1987) (per curiam). That is precisely what happened here: Tyson proposed that the jury be instructed to consider representative proof and be permitted to award damages that were "approximate," but Tyson objects now that the jury has followed Tyson's own instructions.[2] Tyson has waived its argument on the first question presented.

B. Tyson's claimed circuit split on the use of representative proof does not exist.

Even aside from waiver, review is unwarranted.

In *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946), the Court held that, in a wage/hour case in which the employer failed to keep records of time

---

[2] Respondents raised this waiver argument below. *See* Br. of Appellees, *Bouaphakeo v. Tyson Foods*, No. 12-3753 (8th Cir. filed Apr. 29, 2013), at 28-29.

worked, employees could prove the amount of time worked "as a matter of just and reasonable inference." *Id.* at 687. In practice, that principle meant that a group of 300 employees in a FLSA collective action could make out their claim based on the representative testimony of eight employees whose estimates of the uncompensated time spent walking to work stations ranged from 30 seconds to 8 minutes and where walking distances varied from 130 feet to 890 feet. *See id.* at 683; *Mt. Clemens Pottery Co. v. Anderson*, 149 F.2d 461, 461-62 (6th Cir. 1945) (discussing testimony and size of class). The IWPCL claim is subject to the same standards as the FLSA claim. *See* Pet. App. 5a n.2. Here, the application of *Mt. Clemens* is consistent with *Mt. Clemens* itself, with *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011), and with the various appellate decisions that Tyson claims conflict with the decision below.

1. As in *Mt. Clemens*, the trial court permitted the use of representative testimony, notwithstanding individual variations of several minutes, where the employer failed to keep records of the time for which employees seek compensation. Pet. App. 8a.

Tyson stresses the individual nature of the unpaid overtime claims, quoting the requirement of *Mt. Clemens* that a worker prove "that *he* performed work for which *he* was improperly compensated." Pet. 19 (quoting *Mt. Clemens*, 328 U.S. at 687) (internal quotation marks omitted and emphasis added by Tyson); *see also id.* ("[The Eighth Circuit] said that to apply the time study to 'individual overtime claims did require inference, but this inference is allowable under *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S.

680, 687 ... (1946).' Pet. App. 8a. That is simply incorrect.").[3]

What Tyson overlooks is the manner in which, under *Mt. Clemens*, the individual is permitted to prove that he was improperly compensated in the specific context in which the employer failed to keep records: just and reasonable inferences from representative proof. *See* 328 U.S. at 683, 687, 693. The district court and court of appeals applied that

---

[3] Tyson characterizes Judge Beam's dissent from the denial of rehearing en banc as raising a different concern about *Mt. Clemens*: according to Tyson, Judge Beam objected that *Mt. Clemens* permits representative proof on damages "*only after*" plaintiffs prove that each individual performed work for which he was not properly compensated. Pet 14 (emphasis in original). But the words "only after" do not appear in Judge Beam's dissent, which at times suggested the opposite of what Tyson claims he said. Specifically, Judge Beam suggested that *Mt. Clemens* permits the use of representative proof for liability but not damages. *See* Pet. App. 118a (Beam, J.) ("[I]ndividual '*damages*,' not group liability, are the fighting issue."); *id.* at 119a (explaining that representative proof in *Mt. Clemens* "may have been relevant to *liability*' but "has no relevance whatever to *damages*"). At other points, Judge Beam appeared to accept the use of representative proof for damages. *See id.* at 121a ("[T]here is precedent for the proposition that if an employer has failed to keep payroll records, employees are to be awarded compensation based upon the most accurate basis possible."). Whatever Judge Beam's view, it is different from what Tyson itself is arguing: that *both* liability and damages are individual issues not subject to representative proof in any respect. *See* Pet. 19.

Amicus U.S. Poultry & Egg Association makes an argument about *Mt. Clemens* similar to the one Tyson attributes to Judge Beam: that liability and damages must be treated differently. *See* Br. of U.S. Poultry & Egg Ass'n As Amicus Curiae 19-21. Again, that is not what Tyson argues here.

rule here, permitting no more and no less than this Court did in *Mt. Clemens*.

2. Tyson relies heavily on *Wal-Mart Stores, Inc. v. Dukes*, but that case is doubly distinguishable. First, *Dukes* disapproved the prospect of "trial by formula" in a massive sex-discrimination class action where the lower court had proposed that the subjective question at the heart of each class member's claim — "why was I disfavored," 131 S. Ct. at 2552 — be determined for all class members in proceedings concerning a sample set of class members, *see id.* at 2561. Absent a common discriminatory policy or practice, however, a "sample" determination that some plaintiffs had been discriminated against would say nothing about the reasons other plaintiffs had not been promoted. This case concerns a wholly different type of claim: a claim for unpaid overtime, which depends on common proof as to the employer's compensation policies and an objective determination of the amount of time worked. For nearly seventy years, such claims have been governed by the special *Mt. Clemens* rule suited to that context.

Second, the court of appeals here did not rely on representative proof alone, but instead noted that the class used individual employee time records, Pet. App. at 10a, to "apply this [representative] analysis to each class member individually," *id.* at 11a. The damages verdict was given in the aggregate, but Tyson did not object to an aggregate verdict, and the jury was instructed that individuals who had already received full compensation could receive no award. *See id.* at 130a-31a (Benton, J., respecting the denial of rehearing en banc).

3. None of the court of appeals cases Tyson cites conflicts with the decision below, either. First, most of the cases cited did not concern wage/hour claims at all, and so they did not apply *Mt. Clemens* and accordingly cannot conflict with the decision below on that point. *See In re Urethane Antitrust Litig.*, 768 F.3d 1245 (10th Cir. 2014) (antitrust case); *McLaughlin v. Am. Tobacco Co.*, 522 F.3d 215 (2d Cir. 2008) (RICO class action by cigarette purchasers based on fraud by manufacturers); *Broussard v. Meineke Discount Muffler Shops, Inc.*, 155 F.3d 331 (4th Cir. 1998) (class action by franchisees for breach of contract by franchisor); *Cimino v. Raymark Indus., Inc.*, 151 F.3d 297 (5th Cir. 1998) (asbestos products-liability case); *In re Fibreboard Corp.*, 893 F.2d 706 (5th Cir. 1990) (same).

Second, all of the cases on which Tyson relies involved much greater variation -- both in degree and in kind — among claims of class members than is present here. Although Tyson's employees differ as to precisely which protective equipment they don and doff, and exactly how long these activities and walking to their work stations take, the sum total of these differences is (as in *Mt. Clemens*) a matter of a few minutes, even by Tyson's own account. *See* Pet. 16, 18.

By contrast, the variations among the employees in *Espenscheid v. DirectSat USA, LLC*, 705 F.3d 770 (7th Cir. 2013), were stark. There, the employees were home-satellite repair technicians who were paid on a per-job basis, not per hour, *id.* at 772-73, and so the "hourly wage varie[d] from job to job and worker to worker," *id.* at 774. Compounding the difficulties of using representative proof in that case was the absence of any "suggestion that sampling methods

used in statistical analysis were employed." *Id.* (Here, unlike in *Espenscheid*, the plaintiffs' expert testified that "the sample was large for this type of study, representative, and approximately random" and that "the study used 'accepted procedures in industrial engineering.'" Pet. App. 13a.) Yet another complication in *Espenscheid* was that some workers allegedly underreported their time not because of impermissible pressure from the employer "but because [they] wanted to impress the company with [their] efficiency." 705 F.3d at 774. These myriad issues presented variations among class members on a different order of magnitude from differences of a few minutes walking to a work station.

The non-wage/hour cases Tyson cites in which class certification was denied likewise presented dramatic variations among class members. *McLaughlin* reversed class certification of smokers' fraud claims against cigarette manufacturers where "individual smokers would have incurred different losses depending on what they would have opted to do, but for defendants' misrepresentation." 522 F.3d at 228. *Broussard* reversed class certification of franchisees' breach-of-contract claims where "franchisees' contractual rights and obligations differ; [the franchisor] directed different representations to different franchisees; franchisees relied on these representations in a different manner or to a different degree; each franchisee's entitlement to toll the statute of limitations is fact-dependent; and the profits lost by franchisees also differed according to their individual business circumstances." 155 F.3d at 343.

In the two asbestos cases Tyson cites, the Fifth Circuit reversed trial plans — not class certification

— because (among other problems) the contemplated use of representative proof was contrary to specific state-law restrictions on inferring causation as to groups from causation as to individuals. *Cimino*, 151 F.3d at 313; *Fibreboard*, 893 F.2d at 711-12. By contrast, here the FLSA claim and the state wage/hour claim were substantively the same and subject to the same "terms of proof." Pet. App. 5a n.2. An additional problem in *Cimino* was that the trial plan did not provide the juries with the opportunity to determine whether defendants' products were the causes of even the sample plaintiffs' medical conditions. 151 F.3d at 305, 315. And in *Fibreboard*, the diverse class "consist[ed] of persons claiming different diseases, different exposure periods, and different occupations." 893 F.2d at 710. These types of differences are on a different scale from the minor variations at issue in this wage/hour case.

Finally, Tyson's claim that the decision below conflicts with *Jimenez v. Allstate Ins. Co.*, 765 F.3d 1161 (9th Cir. 2014), is incorrect. First, that case, like this one, *affirmed* the certification of a class. See *id.* at 1162-63. Second, that case, like this one, *endorsed* the use of "statistical sampling and representative testimony." *Id.* at 1167. Although the court in *Jimenez* stated that such techniques are not acceptable for determining damages, *id.*, that statement is pure dicta because the district court in that case had not yet identified the means of determining damages, *id.* at 1164. In fact, as noted, this Court's decision in *Mt. Clemens* permitted the use of representative proof regarding damages where an issue — such as the amount of time it takes to perform a particular task — can be the subject of reasonable inferences based on common proof. This

Court does not grant review to correct stray dicta, much less dicta in opinions *other* than the one on which certiorari is sought.

Because Rule 23 provides a context-specific standard, not a rule, it is unsurprising that different facts yield different results. None of the decisions Tyson cites conflicts with the decision below.

C. The Court does not grant review to second-guess facts found in the lower courts, particularly where, as here, ample evidence supported the verdict.

Without a circuit conflict, Tyson is left with a run-of-the-mill challenge to the sufficiency of the evidence in a case where both the trial court and the appellate court agreed that the jury's verdict was permissible. "A court of law, such as this Court is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error." *Exxon Co., U.S.A. v. Sofec, Inc.*, 517 U.S. 830, 841 (1996) (quoting *Graver Tank & Mfg. Co. v. Linde Air Prods. Co.*, 336 U.S. 271, 275 (1949)) (internal quotation marks omitted); *see generally United States v. Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant a certiorari to review evidence and discuss specific facts.").

In any event, the decision below was correct to hold that "[t]he evidence is susceptible to the reasonable inference that the jury's verdict is correct." Pet. App. 13a (citation, internal quotation marks, and source's alteration marks omitted). As the court of appeals explained, the sample used to determine average times consisted of hundreds of employees, and plaintiffs' expert testified that it "was

large for this type of study, representative, and approximately random" and "used 'accepted procedure in industrial engineering.'" *Id.* Tyson admitted that a significant amount of overtime was being performed and that K-code time did not include the donning and doffing of all protective equipment, and damages were awarded based not only on representative donning, doffing, and walking times but also on individual timesheets. *Id.*[4]

II. The Question Whether A Class Must Show That All Its Members Sustained Injury Does Not Warrant Review.

A. The question was not decided below.

Regarding Tyson's argument that the class should be decertified because not all of its members suffered injury, the court of appeals expressed concern that Tyson had exaggerated the authority for its position. *Id.* at 9a. Ultimately, however, the court declined to decide the question, finding that Tyson's own requested jury instruction had invited the error. *Id.* at 10a.[5] Tyson does not argue that the correctness of

---

[4] The Court should reject the attempts of various amici to introduce additional issues not presented by this case, such as the standard for certifying issue classes (which the district court did not do) or whether *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013), forecloses class certification where individual class members have sustained different amounts of damage (which *Tyson* does not argue here and did not argue below). *See* Br. Amicus Curiae [sic] of the Equal Employment Advisory Council 16-20 & nn. 2-3 (raising these issues).

[5] Tyson's characterization of the court of appeals as having "provided no further analysis or explanation" of its views after remarking on Tyson's exaggeration, Pet. 13, is thus incorrect: as Tyson later acknowledges, *id.* at 29-30, the Court rejected the argument as invited error, Pet. App. 10a.

the appellate court's finding is a question that merits review, nor does Tyson include a challenge to that ruling as a question presented. Rather, Tyson addresses the invited-error argument only as an afterthought in a single paragraph of the petition. Pet. 29-30.

As to Tyson's question presented, because this Court is "a court of final review and not first view," it ordinarily "do[es] not decide in the first instance issues not decided below." *Zivotofsky v. Clinton*, 132 S. Ct. 1421, 1430 (2012) (citations and internal quotation marks omitted); *accord Pa. Dep't of Corr. v. Yeskey*, 524 U.S. 206, 212-13 (1998); *Delta Air Lines, Inc. v. August*, 450 U.S. 346, 362 (1981). There is no reason to depart from that procedure here. If, as Tyson avers, the question is important and recurring, Pet. 30-32, it will surely arise again in a case that properly presents the issue. Tyson's suggestion that the issue rarely reaches the courts of appeals, *id.* at 31, is belied by the nine appellate cases Tyson cites discussing the issue, *id.* at 26-28 & n.9.

B. The claimed circuit split is illusory.

Tyson's claim that the circuits are divided over the inclusion of uninjured persons in certified classes fails in any event. Tyson is correct that some circuits have held that a class need *not* show, as a prerequisite to certification, that *all* class members necessarily suffered injury. *See, e.g., In re Nexium Antitrust Litig.*, 777 F.3d 9, 21-22 (1st Cir. 2015); *Kohen v. Pac. Inv. Mgmt. Co.*, 571 F.3d 672, 677 (7th Cir. 2009), *cited at* Pet. 26. In support of their view, these decisions point to (among other things) the infeasibility of assessing standing before all class members are identified and other safeguards against

recovery by uninjured class members. *See Nexium*, 777 F.3d at 21-22; *Kohen*, 571 F.3d at 677. These decisions also have strong support from this Court's repeated recognition that Article III does not require that all plaintiffs have standing. *See, e.g., Horne v. Flores*, 557 U.S. 433, 446-47 (2009); *Rumsfeld v. Forum for Academic & Inst. Rights, Inc.*, 547 U.S. 47, 52 n.2 (2006); *Bowsher v. Synar*, 478 U.S. 714, 721 (1986); *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 264 & n.9 (1977).

On the "other side" of Tyson's supposed conflict are a handful of statements that were neither accompanied by analysis nor outcome-determinative. First, Tyson quotes the statement in *Denney v. Deutsche Bank AG*, 443 F.3d 253 (2d Cir. 2006), that all class members must have standing. *Id.* at 264. However, that case neither gave an affirmative reason for that requirement nor explained why courts must assess the standing of each individual unnamed class member despite this Court's general rule that courts need not consider standing as to each named plaintiff even in a non-class action. In any event, in *Denney* the court found that the class had standing, so its statement did not determine the outcome. *See id.* at 265-66.

Next, Tyson cites *Mazza v. Am. Honda Motor Co.*, 666 F.3d 581, 594 (9th Cir. 2012), but that case said even less: it merely quoted one sentence from *Denney*, then held that the class at issue had standing. *Id.* at 594-95. Moreover, the Ninth Circuit has repeatedly applied the opposite rule, including once en banc: "In a class action, standing is satisfied if at least one named plaintiff meets the requirements." *Bates v. United Parcel Serv., Inc.*, 511 F.3d 974, 985 (9th Cir. 2007) (en banc); *accord*

Stearns v. Ticketmaster Corp., 655 F.3d 1013, 1021 (9th Cir. 2011); *Fleming v. Pickard*, 581 F.3d 922, 924 n.3 (9th Cir. 2009).

In re Deepwater Horizon, 739 F.3d 790 (5th Cir.), *cert. denied sub nom. BP Exploration & Prod. Inc. v. Lake Eugenie Land & Dev., Inc.*, 135 S. Ct. 754 (2014), which Tyson cites in a footnote, also does not help Tyson. In that case, the Fifth Circuit expressly declined "to choose whether *Kohen* or *Denney* articulated the correct test." 739 F.3d at 802. The cases the Fifth Circuit cited in support of the *Denney* view were *Denney* itself, *Mazza*, and cases from the Seventh and Eighth Circuits, *see id.* at 801 & nn. 27-29, which Tyson concedes do *not* require proof that 100% of class members were injured, Pet. 27, 29.

Tyson mischaracterizes the holding of *In re Rail Freight Fuel Surcharge Antitrust Litigation*, 725 F.3d 244 (D.C. Cir. 2013). In that case, the court's concern about whether the class contained uninjured members did not, as Tyson implies, lead the court to reject class certification. Rather, the court's discussion of uninjured class members arose in the context of deciding whether to hear an interlocutory appeal of class certification under Rule 23(f). *See id.* at 250-54. The court exercised its discretion to hear the appeal based on several factors, including the fresh guidance that this Court had provided five months earlier in *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013). The court's ultimate disposition on the merits was merely a remand for reconsideration in light of *Behrend* to consider possible flaws in the class's damages model — *not* a holding that the presence of any uninjured class member defeats certification. *See* 725 F.3d at 255 ("Mindful that the district court neither considered the damages model's

flaw in its certification decision nor had the benefit of *Behrend*'s guidance, we will vacate class certification and remand the case to the district court to afford it an opportunity to consider these issues in the first instance. We need not reach the defendants' alternate grounds for relief." (citation omitted)).

The Court does not grant review based on a "mere[] inconsistency in dicta or in the general principles utilized." Shapiro, Geller, et al., *Supreme Court Practice* § 4.3, at 241 (10th ed. 2013). Moreover, for a conflict to be worthy of resolution by this Court, it should be "[w]ell-[d]eveloped," and review of the question should not be taken where it "requires 'further study' in lower courts." *Id.* § 4.4(b), at 247 (quoting *McCray v. New York*, 461 U.S. 961, 963 (1983) (Stevens, J., respecting the denial of certiorari)). Here, several courts have held, consistent with this Court's approach to standing and based on fully articulated reasoning, that a class need not verifiably consist of only injured members in order to be certifiable. The cases Tyson cites for the contrary view have not analyzed the question. Moreover, Tyson does not point to any case in which class certification was actually precluded because of the class's failure to prove, at the outset of the case, that 100% of class members sustained injury. Thus, even if this case properly presented the question (which it does not), review would be unwarranted.

Finally, this case presents no basis for concern about the use of Rule 23 to expand substantive rights by affording recoveries to uninjured class members. The jury was instructed to base its award only on amounts it found to be owing to class members who had not received full compensation. Pet. App. 10a ("[T]he jury was instructed, 'Any employee who has

already received full compensation for all activities you may find to be compensable is not entitled to recover any damages.'").

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

ROBERT L. WIGGINS, JR.
WIGGINS, CHILDS, QUINN & PANTAZIS, LLC
301 19th Street North
Birmingham, AL 35203
(205) 314-0540

SCOTT MICHELMAN
Counsel of Record
SCOTT L. NELSON
PUBLIC CITIZEN LITIGATION GROUP
1600 20th Street NW
Washington, DC 20009
(202) 588-1000
smichelman@citizen.org

Counsel for Respondents

April 2015